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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/604,780

Filing Date: August 15, 2003

Appellant(s): WILLIAMS ET AL.

John E. McGarry
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed September 8, 2008 appealing from the Office action mailed April 4, 2008. It is noted that the front cover of the Appeal Brief correctly stated the Application number of the case, however, the Application Number in the headers of the succeeding pages were inadvertently written as 10/604,708. Accordingly, the headers on pages 2-35 are taken to read as 10/604,780.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

3,488,287	SEGLIN et al.	1-1970
3,970,584	HART et al.	7-1976
3,722,753	MILES	3-1973
5,421,492	BARGER et al.	6-1995
5,921,447	BARGER et al.	7-1999
3,970,219	SPITZER et al.	7-1976
6,021,926	LAUWERS et al.	2-2000

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(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

9.1. Claims 49, 51, 52, 54, 96-98 and 115 are rejected under 35 U.S.C. 103(a) as being unpatentable over Seglin et al. (US Patent No. 3,488,287), hereinafter “Seglin” for the reasons set forth in the previous office action and which is repeated below.

Seglin teaches dispensers and peroxide-soap compositions which are used to produce warm lather (see col. 1, lines 27-29; 62-63). Although the warm lather is used as a shaving lather, it could also be used to provide other types of warm lathers such as warm shampoo lathers

(see col. 2, lines 10-15). Different dispensers such as those shown in Figures 1-4 can be used (see Figures 1-4). In Figure 1, the peroxide storage reservoir 6, peroxide measuring chamber 7 and other parts of the dispenser which are in contact with hydrogen peroxide should be constructed of materials which do not cause decomposition of hydrogen peroxide, and suitable materials include plastic, plastic coated metal, stainless steel and aluminum (see col. 2, line 69 to col. 3, line 3). Rather than a piston arrangement as in Figure 2, an aerosol-type dispenser in which plunger 20 activates suitable pressure release valves could be employed, and in this case the peroxide and soap components will contain a nominal amount of a low boiling inert propellant such as a chlorofluorocarbon (see col. 4, lines 4-10). A dispenser as in Figure 3 could also be an aerosol-type container having a pressure release valve (see col. 4, lines 20-42). Peroxide-soap compositions which are suitable for use in embodiment of Figure 3 are those which comprise about 5-30% by weight non-ionic detergent, about 30-94% water (which is understood to be deionized), and about 1-25% hydrogen peroxide (100%) (see col. 4, line 75 to col. 5, line 4), and may also contain other ingredients including 0-15% by weight of polyol humectants (which may read on anti-soil protectants) such as ethylene glycol, diethylene glycol; thickening agents (which reads on stabilizer), skin soothers and perfumes (see col. 5, lines 28-45). The density of the lather can be further varied in a number of ways, and it can be decreased by adding an inert propellant such as trichlorofluoromethane thereby increasing the volume of gases available for lathering (see col. 7, lines 8-26). Seglin, however, fails to specifically disclose a peroxide-soap composition in an aerosol-type dispenser wherein the inner surface is made of uncoated aluminum.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to prepare an aerosol-type dispenser containing peroxide-soap composition in a dispenser made of aluminum because Seglin teaches in col. 2, line 69 to col. 3, line 3 that the parts of the dispenser which are in contact with hydrogen peroxide should be constructed of materials which do not cause decomposition of hydrogen peroxide, and one suitable material includes aluminum.

9.2. Claims 55-56 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Seglin as applied to the above claims, and further in view of Hart et al. (US Patent No. 3,970,584), hereinafter “Hart” for the reasons set forth in the previous office action and which is repeated below.

Seglin teaches the features as described above. However, Seglin fails to specifically disclose a dip tube being made of a thermoplastic material such as an olefin polymer.

Hart teaches a similar package wherein the dip tube is made from polyethylene (see col. 5, line 38).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have utilized a dip tube made from polyethylene because it is shown from Hart that dip tubes of said material is common in a similar package.

9.3. Claim 57 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Seglin as applied to the above claims, and further in view of Miles (US Patent 3,722,753) for the reasons set forth in the previous office action and which is repeated below.

Seglin teaches the features as described above. However, Seglin fails to specifically disclose the valve made of nylon.

Miles teaches a similar package wherein the valve is made of nylon (see col. 3, lines 65-67).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have utilized a valve made of nylon in the container of Seglin because it is shown by Miles that said material is useful as a valve in a similar package.

9.4. Claims 58-59 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Seglin and Miles as applied to claim 57 above, and further in view of Barger et al. (US Patent No. 5,421,492), hereinafter “Barger ‘492” for the reasons set forth in the previous office action and which is repeated below.

Seglin and Miles teach the features as described above. However, the combination of reference fails to specifically disclose the valve containing a spring that is made from stainless steel and the diameter of the orifice.

Barger ‘492 teaches a similar package wherein the valve containing a spring is made of stainless steel (see col. 5, lines 34-50), and a dispensing passage 19 (see Figures 3 and 4).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have utilized a spring made of stainless steel in the container of Seglin and Miles because, not only is a stainless steel spring in the valve a common material used in similar package as shown by Barger '492, but also, said material is resistant to corrosion. With respect to the diameter of the dispensing passage, it would have been obvious to one of ordinary skill in the art at the time the invention was made to optimize the diameter of the orifice through routine experimentation for best results. As to optimization results, a patent will not be granted based upon the optimization of result effective variables when the optimization is obtained through routine experimentation unless there is a showing of unexpected results which properly rebuts the *prima facie* case of obviousness. See *In re Boesch*, 617 F.2d 272,276,205 USPQ 215,219 (CCPA 1980). See also *In re Woodruff* 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990), and *In re Aller*, 220 F2d 454,456,105 USPQ 233,235 (CCPA 1955).

9.5. Claim 94 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Seglin and Hart as applied to claim 55 above, and further in view of Barger et al. (US Patent No. 5,921,447), hereinafter "Barger '447" for the reasons set forth in the previous office action and which is repeated below.

Seglin and Hart teach the features as described above. However, the combination of reference fails to specifically disclose the gasket made of ethylene propylene diene terpolymer.

Barger '447 teaches a similar package wherein the gasket is made of ethylene propylene diene (see col. 10, lines 46-48).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have utilized a gasket made of ethylene propylene diene terpolymer in the container of Seglin and Hart because it is shown by Barger '447 that said material is useful as a gasket in a similar package.

9.6. Claim 95 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Seglin as applied to the above claims, and further in view of Spitzer et al. (US Patent No. 3,970,219), hereinafter "Spitzer" for the reasons set forth in the previous office action and which is repeated below.

Seglin teaches the features as described above. However, Seglin fails to specifically disclose a container made of anodized aluminum.

Spitzer teaches a similar package wherein the container is made of anodized aluminum (see col. 6, lines 21-24).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to have utilized a container made of anodized aluminum because it is shown from Spitzer that containers of said material is common in a similar package.

9.7. Claim 99 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Seglin as applied to the above claims, and further in view of Lauwers et al. (US Patent No. 6,021,926), hereinafter "Lauwers" for the reasons set forth in the previous office action and which is repeated below.

Seglin teaches the features as described above. Seglin, however, fail to disclose the pressure of the chamber.

Lauwers, an analogous art, teaches an aerosol package wherein the pressure inside the container created by the gaseous propellant is preferably at least 5 bar (72.5 psi) at 20°C (see col. 6, lines 32-54).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to reasonably expect the pressure inside the container of Seglin to be at least 5 bar or 72.5 psi because it is known from Lauwers that similar aerosol package provide a pressure as those recited.

(10) Response to Argument

The Appellant Argues/ The Examiner's Response

A. With respect to the obviousness rejection based upon Seglin, Appellant argues that Seglin does not disclose mixing a propellant with hydrogen peroxide to pressurize the oxidizing composition to a level sufficient to spray the peroxide onto a surface to be cleaned, rather, the hydrogen peroxide in Seglin is delivered to a reaction chamber via a tube and an optional pressure valve, not onto a surface to be cleaned through a dispensing spray outlet as set forth in Appellants' claim 49. Appellant also argues that Seglin specifically teaches away from storing hydrogen peroxide under a pressure sufficient to spray the peroxide onto a surface to be cleaned because in col. 1, lines 57-58, Seglin discloses that one of the advantages of their invention is that it does not require the use of a high pressure system.

The Examiner respectfully disagrees with the above arguments because of the following reasons. Seglin, in col. 1, lines 57-58, teaches that the dispenser does not necessarily require the use of a high pressure system. Likewise, in col. 1, lines 60-62, Seglin teaches that another object (of the invention) is to provide a method of producing warm lather in which it is not essential that a high pressure system be used. Although a high pressure is not necessarily required, or is not essential, this does not mean that a high pressure cannot be used. More so, the teachings specify high pressure. Therefore, pressures other than the "high" pressure, which include "sufficient" is envisaged. Appellant's independent claim 49 does not require the use of high pressure, rather, "a level sufficient to spray..." In addition, it is clear from Seglin that an aerosol-type dispenser is disclosed, see col. 4, lines 6 and 34, and such aerosol-type dispensers should reasonably contain a propellant sufficient to discharge the contents from the container. Even assuming that the propellant in Seglin is only sufficient to discharge the content to the reaction chamber, as argued by Appellant, the propellant would still be discharged, or trigger the discharge of the composition from the dispenser.

Inasmuch as Seglin teaches an aerosol dispenser, propellant and peroxide composition, the mixture of the propellant and hydrogen peroxide should reasonably pressurize the peroxide composition to a level sufficient to spray the peroxide composition onto a surface to be cleaned as required in the present claims. In addition, the said phrase above, i.e. "to pressurize the peroxide composition to a level sufficient to spray the peroxide composition onto a surface to be cleaned" is an intended function, which function flows from the aerosol dispenser of Seglin.

Appellant also argues that Seglin does not disclose a hydrogen peroxide and a propellant (resulting in an aerosol product) in a container formed from uncoated aluminum.

The Examiner respectfully disagrees with the above arguments because in col. 2, line 69 to col. 3, line 3, Seglin teaches:

Peroxide storage reservoir **6**, peroxide measuring chamber **7** and other parts of the dispenser which are in contact with hydrogen peroxide should be constructed of materials which do not cause decomposition of hydrogen peroxide. Suitable materials include plastic, plastic coated metal, stainless steel and aluminum.

It is inferred from this teaching that the aluminum is an uncoated aluminum. Please note that when the suitable material is coated, Seglin explicitly recites that it is so, for example, "plastic coated metal", see col. 3, line 2.

Appellant also argues: *Had the Examiner considered the evidence set forth in the article published in Spray Technology & Marketing, March 2006 of Dr. Tait, filed with Applicant's Response filed April 4, 2006, (Tait publication), the Declaration Under 37 C.F.R. § 132 of Eric Hanson, filed January 31, 2007, (Hansen Declaration), the Declaration Under 37 CFR § 1.132 of William Stephen Tait, PhD, filed July 17, 2007, (Tait Declaration), and the Declaration Under 37 CFR § 1.132 of Montford A Johnsen, filed October 23, 2006, (Johnsen Declaration) all of record, she could not have reasonably concluded that it would have been obvious to one skilled in the art at the time of the invention to place the peroxide and propellant of Seglin et al. '287 in a container formed wholly from uncoated aluminum - especially at a pressure level sufficient to spray the peroxide composition onto a surface to be cleaned.*

The Examiner respectfully disagrees with the above argument because of the following reasons:

With respect to the Tait publication, Appellants already conceded that the Tait reference is not a prior art reference due to its March 2006 publication date. Please see Appellant's Arguments/Remarks dated April 24, 2006, page 2, first paragraph and last 5 lines (marked page 13 of 19 of Appellant's header).

With respect to the declarations under 37 CFR 1.132 filed October 23, 2006 (Johnsen Declaration, which was re-submitted with the filing of an RCE on January 11, 2007) and January 31, 2007(Hansen Declaration), the Examiner, in the non-final rejection dated April 17, 2007, considered the declarations and stated that the above declarations were insufficient to overcome the rejections based upon the newly cited prior art because of the following reasons. (Please note that the newly cited prior art mentioned here were withdrawn in the succeeding office action).

The declaration, in particular, the declaration dated January 31, 2007, cited OXYKIC/OxyDeep 2X spot cleaner as containing hydrogen peroxide and propellant, however, the declaration did not provide the actual components in said cleaners to determine whether they are commensurate in scope with the claims or not. It is not clear whether the above cited spot cleaners contain other undisclosed ingredients which may be responsible for the alleged packaging success in the unlined aluminum can. In addition, the declaration is not commensurate in scope with the claims because the alleged success was due, at least in part, with hydrogen peroxide, and not any other peroxide composition as required in independent claim 49. With respect to the success in sales of

said product, it is not seen in the declaration whether such success was due to the ingredients of the formulation, or only because of marketing strategies.

With respect to the declaration dated July 17, 2007 (Tait Declaration), this was rendered moot by the Examiner in the office action dated October 9, 2007, in view of the new grounds of rejection to Seglin.

Hence, it cannot be said that the Examiner had not considered the above declarations.

B. With respect to the obviousness rejection of dependent claim 96 based upon Seglin, Appellant argues that claim 96 distinguishes over Seglin independently in calling an anti-soil and/or an anti-stain protectant in the oxidizing composition. Appellant argues that "*Seglin et al. '287 does not disclose these compounds. There would be no reason to include these compounds in Seglin et al. '287 because Seglin et al. '287 is not concerned with a carpet cleaning composition. The foam soap compositions of Seglin et al. '287 are intended for shaving applications and not for carpet cleaner applications in which anti-soil and anti-stain compounds are used. Although Seglin et al. '287 discloses that the compositions can be used for "other types of lathers such as warm shampoo lathers" (col. 2, lines 11-15), these lathers would likely be hair shampoos and not carpet cleaning compositions. The Examiner has cited col. 5 lines 28-45 as disclosing other additives to the peroxide soap composition, including polyol humectants as possible anti-soil protectants. A humectant is a substance that promotes moisture. An anti-soil protectant is a substance that prevents resoil of a carpet after it has been cleaned due to the*

presence of soap. It is anything but a substance that promotes moisture. Moisture in a cleaned carpet would promote collection of dirt and promote resoil the carpet. Therefore, claim 96 further distinguishes over Seglin et al. '287. "

The Examiner respectfully disagrees with the above arguments because, as already stated in the previous office actions dated October 9, 1007 and April 4, 2008, Seglin, in col. 5, lines 28-45 teaches other ingredients like polyol humectants which may read on anti-soil protectants. The present claim 96 requires a "generic" anti-soil and/or anti-stain protectant, and in the absence of specific components to distinguish them from other components, the polyol humectants of Seglin reads on said protectant. Please note that the present claims are drawn to a manual spray cleaner for removing dirt and stains, and there is nowhere required that it is a carpet cleaner. Even assuming that the intended use of a carpet cleaner is recited, Seglin need not teach a carpet cleaner use of his composition because the two different intended uses are not distinguishable in terms of the composition, see *In re Thuau*, 57 USPQ 324; *Ex parte Douros*, 163 USPQ 667; and *In re Craige*, 89 USPQ 393.

C. With respect to the obviousness rejection based upon Seglin in view of the secondary references to each of Hart, Miles, Miles and Barger '492, Hart and Barger '447, Spitzer, and Lauwers, Appellant argues that the alleged combination of each of the secondary references with Seglin does not meet the deficiencies of Seglin as set forth above with respect to claim 49.

The responses to Seglin above apply here as well. Hence, the combination of Seglin with each of Hart, Miles, Miles and Barger '492, Hart and Barger '447, Spitzer, and Lauwers are proper and are maintained.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Lorna M Douyon/

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